

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-7292

Nos. 76-7292 76-7450
76-7391 76-7466
76-7506 76-7485
76-7449 76-8240

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM
and WILHELMINA P. SEALES, JOHN MEDIGE, and
the CITIZENS COUNCIL FOR HUMAN RELATIONS,
INC. and NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, BUFFALO
BRANCH,

Appellees,

-against-

EWALD B. NYQUIST, Individually and as
Commissioner of Education of the State of
New York, THE BOARD OF REGENTS OF THE STATE
OF NEW YORK, THEODORE M. BLACK, CARL H.
PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR.,
JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK,
HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN
I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM
JOVANOVICH, MARY ALICE KENDALL, JORGE L.
BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL
and LAURA BRADLEY CHODOS (Individually and
as Members of the Board of Regents of the
State of New York), JOSEPH MANCH, Individually
and as Superintendent of Schools of the City
of Buffalo, EUGENE T. REVILLE, Individually
and as Superintendent of Schools of the City
of Buffalo, THE BOARD OF EDUCATION OF THE
CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E.
SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON,
DR. MATT A. GAJEWSKI, LOUIS C. BENTON,
MICHAEL J. RYAN, JOSEPH D. HILLERY and
MARILYN P. KAVANAUGH (Individually and as
Members of the Board of Education of the City
of Buffalo), STANLEY M. MAKOWSKI, Mayor of
the City of Buffalo, and DELMAR L. MITCHELL,
RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W.
SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA,
MICHAEL MCCARTHY, WILLIAM B. HOYT, GEORGE K.
ARTHUR, RICHARD F. OKONIEWSKI, HORACE C.
JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO,
DANIEL J. HIGGINS and WILLIAM A. PRICE,
constituting the members of the Common Council
of the City of Buffalo,

Appellants.

Appeal from the United States District Court
for the Western District of New York.

B
P/S



BRIEF ON BEHALF OF APPELLANTS
NYQUIST, BOARD OF REGENTS, BLACK,
PFORZHEIMER, ALLAN, CLARK, NEWCOMB,
BATISTA AND CHODOS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants,
Nyquist, Board of Regents,
Black, Pforzheimer, Allan,
Clark, Newcomb, Batista
and Chodos
The Capitol
Albany, New York 12224
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

EUGENE PANFIL
Assistant Attorney General

of Counsel

TABLE OF CONTENTS

	<u>Page</u>
Statement	2
Issues Presented	2
Statement of the Case	4
Facts	6
Decisions Below	29
Summary of Argument	39

ARGUMENT:

Point I --- The acts of segregation which plaintiffs alleged in their complaint and attempted to prove at the trial are those of units of State and local government and not of the individual defendants. Such governmental units are not "persons" so as to confer jurisdiction on the District Court pursuant to 42 U.S.C. § 1983. Plaintiffs have not alleged or established jurisdiction under any other statute.	40
Point II -- The Fourteenth Amendment to the Constitution of the United States does not require that states undertake to eliminate racial imbalance in their schools or, where the states have elected to do so as a matter of educational policy, require racial balance to be achieved in any time limit or at any set speed.	47

TABLE OF CONTENTS Cont'd.

	<u>Page</u>
Point III -- The State defendants have made continuous and consistent efforts to try to achieve racial balance in the Buffalo schools and have not failed to take any action which is constitutionally required of them. . .	66
Conclusion	70

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Austin Independent School District v. United States, 50 L. Ed. 2d 603 (1977)	6,37, 57,60,61
Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Indiana, 1963), affd. 324 F. 2d 209, cert. den. 377 U.S. 924)	53
Brault v. Town of Milton, 520 F. 2d 730 (2d Cir., 1975).	41,42
Broussard v. Houston Independent School District, 262 F. Supp. 266 (S.D. Texas, 1966)	53
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)	48,49,51
Deal v. Cincinnati Board of Education, 369 F. 2d 55 (1966)	51,52
Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10th Cir., 1964), cert. den. 380 U.S. 914	53
Gilliam v. School Board of City of Hopewell, Virginia, 345 F. 2d 325, 328 (4th Cir., 1965), vacated on other grounds, 382 U.S. 103	52
Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich., 1958).	53
Kenosha, City of v. Bruno, 412 U.S. 507, 513 (1973)	41,42
Keyes v. School District No. 1, 413 U.S. 189 (1973)	32,54
Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y., 1970), affd. 402 U.S. 935	54
Lynch v. Kenston School District Board of Education, 229 F. Supp. 740 (N.D. Ohio, 1964)	53
Matter of the Appeal of Yerby Dixon, 4 N.Y. Ed. Dept. Rep. 115	8,9,35,66
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974)	31,44,45

TABLE OF AUTHORITIES Cont'd.

	<u>Page</u>
<u>Cases Cont'd.</u>	
Milliken v. Bradley, 418 U.S. 717 (1974)	50
Monell v. Department of Social Services, 532 F. 2d 259 (1976)	44
Monroe v. Pape, 365 U.S. 167, 187-192 (1961).	42
Offermann v. Nitkowski, 378 F. 2d 22 (1967), aff'g 248 F. Supp. 129	9, 51, 54
Olson v. Board of Education of Union Free School Dist. #12, Malverne, N.Y., 250 Supp. 1000 (E.D. N.Y., 1966), app. dism. as moot, 367 F. 2d 565.	53
Rizzo v. Goode, 44 U.S.L.W. 4095 (Jan. 20, 1976).	30, 44, 45
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	48
Spomer v. Littleton, 414 U.S. 514 (1974)	31, 44, 45
Strauder v. West Virginia, 100 U.S. 303 (1880)	59
Village of Arlington Heights v. Metropolitan Housing Development Corp. 50 L. Ed. 2d 450 (1977)	37, 61, 62
Washington v. Davis, 426 U.S. 229 (1976).	6, 37, 57, 58, 59, 60, 61, 62, 65
Webb v. Board of Education of the City of Chicago, 223 F. Supp. 466 (N.D. Ill., 1963)	53
Wright v. Rockefeller, 376 U.S. 52 (1964).	59

TABLE OF AUTHORITIES Cont'd.PageConstitution

United States Constitution, Amendment XIV 3,5

Federal Statutes

42 United States Code, § 1983 2,4,29,30,31,
41,45

28 United States Code, § 1331(a) 42

New York Statute

New York Laws of 1969, chapter 342. 47

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-7292 76-7450
 76-7391 76-7466
 76-7506 76-7485
 76-7449 76-8240

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM
and WILHELMINA P. SEALES, JOHN MEDIGE, and
the CITIZENS COUNCIL FOR HUMAN RELATIONS,
INC. and NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, BUFFALO
BRANCH,

Appellees,

-against-

EWALD B. NYQUIST, Individually and as
Commissioner of Education of the State of
New York, THE BOARD OF REGENTS OF THE STATE
OF NEW YORK, THEODORE M. BLACK, CARL H.
PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR.,
JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK,
HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN
I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM
JOVANOVIICH, MARY ALICE KENDALL, JORGE L.
BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL
and LAURA BRADLEY CHODOS (Individually and
as Members of the Board of Regents of the
State of New York), JOSEPH MANCH, Individually
and as Superintendent of Schools of the City
of Buffalo, EUGENE T. REVILLE, Individually
and as Superintendent of Schools of the City
of Buffalo, THE BOARD OF EDUCATION OF THE
CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E.
SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON,
DR. MATT A. GAJEWSKI, LOUIS C. BENTON,
MICHAEL J. RYAN, JOSEPH D. HILLERY and
MARILYN P. KAVANAUGH (Individually and as
Members of the Board of Education of the City
of Buffalo), STANLEY M. MAKOWSKI, Mayor of
the City of Buffalo, and DELMAR L. MITCHELL,
RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W.
SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA,
MICHAEL MCCARTHY, WILLIAM B. HOYT, GEORGE K.
ARTHUR, RICHARD F. OKONIEWSKI, HORACE C.
JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO,
DANIEL J. HIGGINS and WILLIAM A. PRICE,
constituting the members of the Common Council
of the City of Buffalo,

Appellants.

Appeal from the United States District Court
for the Western District of New York.

BRIEF ON BEHALF OF APPELLANTS
NYQUIST, BOARD OF REGENTS, BLACK,
PFORZHEIMER, ALLAN, CLARK, NEWCOMB,
BATISTA AND CHODOS

Statement

These are appeals by defendants in the Court below* from a judgment of the United States District Court for the Western District of New York (CURTIN, J.), entered April 30, 1976, holding that the Board of Education of the City of Buffalo, the Superintendent of Schools, the New York State Commissioner of Education and the Board of Regents of the University of the State of New York have violated plaintiffs' Fourteenth Amendment rights to equal protection of the laws by intentionally causing and maintaining a segregated school system in the City of Buffalo; from an order entered April 30, 1976, granting plaintiffs' motion to amend the complaint to add the individual members of the Board of Regents as parties defendant; from an order entered December 10, 1976 denying the State defendants' motions to reconsider the decision; and for an order, entered March 1, 1977, reaffirming the order of April 30, 1976.

Issues Presented

Did the District Court have jurisdiction of this action pursuant to 42 U.S.C. § 1983 where the acts of segregation

* The City defendants have filed their own separate appeal as have eight other members of the Board of Regents

alleged in the complaint and attempted to be proved at the trial were those of units of State and local governments not of individual defendants?

2. Where the Board of Regents had adopted policy directions requiring the racial balancing of schools in school districts throughout the State, and the Commissioner of Education had directed the Board of Education of the City of Buffalo to racially balance the schools in that city and submit plans for that purpose for the approval of the Commissioner of Education, and where over a period of years various plans had been submitted but racial balance was not achieved and further steps were being taken to compel racial balancing, did the failure to achieve success constitute a denial of plaintiffs' Fourteenth Amendment rights by the State defendants?

3. Does the Fourteenth Amendment to the Constitution of the United States require that states undertake to eliminate racial imbalance as opposed to de jure segregation, in their schools?

4. If a state adopts an educational policy seeking the racial balancing of its schools, does the Fourteenth Amendment require that racial balance be achieved in any time limit or at any set speed?

5. Have plaintiffs proved any intent on the part of the State defendants to segregate Buffalo schools?

Statement of the Case

This action was commenced on June 26, 1972, by service of the complaint, seeking a declaratory judgment and injunctive relief under 42 U.S.C. § 1983, contending that defendants* had deprived plaintiffs and others similarly situated, who are parents of children enrolled in public schools in Buffalo, of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs alleged that the public schools in the City of Buffalo are racially segregated as a result of "policies, practices, customs and acts of omission and commission" by defendants and by other units and agencies of government.

The State defendants moved to dismiss the complaint on; among other grounds, lack of subject matter jurisdiction of the action and failure to join as parties the other units and agencies of government whose acts were alleged to have caused

* At the time the action was commenced only the State Commissioner of Education, the Board of Regents, the Superintendent of Schools of the City of Buffalo and the Buffalo Board of Education were named as parties defendants.

or contributed to the segregation of the Buffalo schools. The City defendants also moved to dismiss the complaint. That latter motion was orally denied by the Court. No decision was ever issued on the State motion nor order entered on the Court's decision as to the City's motion*.

After a long period of examinations before trial the action was tried over a period of nine days in the Fall of 1974. Thereafter, plaintiffs moved to amend their complaint to add the mayor and common council of the City of Buffalo as parties defendant; which was granted. Subsequently, a second motion was made to add the individual members of the Board of Regents and Buffalo Board of Education as parties defendant.

On April 30, 1976, the Court handed down its decision holding that defendants had violated plaintiffs' Fourteenth Amendment rights to equal protection of the laws by intentionally causing and maintaining a segregated school system in the City of Buffalo. Also on April 30, 1976, the Court granted plaintiffs' motion to add a new superintendent of schools and the individual members of the Board of Regents and the Board of Education of the City of Buffalo as defendants.

On June 10, 1976, the Court amended the second order of April 30, 1976 to specifically state that the Board members were added as defendants in their official capacities only and not as individuals.

* The District Judge before whom those motions were heard died several months thereafter.

On June 16, 1976, counsel for eight of the members of the Board of Regents moved for reconsideration of the Court's April 30 judgment on the merits of the action. That motion was subsequently joined in by counsel for the other State defendants. On August 17, 1976, the Court orally denied these motions and on December 10, 1976, handed down a formal decision and order thereon.

Subsequent to the decision of the Supreme Court of the United States in Austin Independent School District v. United States (45 U.S.L.W. 3413), the District Court directed the parties to analyze and brief the application to this action of the decision in Austin and that in Washington v. Davis (426 U.S. 229 [1976]). Thereafter, on March 1, 1977, the Court reaffirmed its decision of April 30, 1976.

Defendants have appealed to this Court from all decisions referred to above.

Facts*

A. Buffalo School Integration in Chronology 1965-1972

In 1960, the Board of Regents of the University of the State of New York ("the Regents"), which has statutory policy making authority over education in the State of New York, both public

* The facts presented here will be primarily those dealing with the involvement of the State defendants, leaving detailing of facts relative to the City and its school districts to the City defendants' appeal.

and private, and elementary, secondary and higher education, issued a policy statement urging the desegregation of New York State's public schools. Similar policy statements have been issued by the Regents periodically from that time to the present, all reaffirming a policy position for the elimination of racial imbalance in the public schools, whether a result of defacto or de jure segregation. In 1963, all school boards were requested by the then Commissioner of Education James Allen to identify to the State Education Department those schools in their districts having a black enrollment in excess of 50%. Guidelines for desegregation were drawn up with primary emphasis on local control and local action to effect desegregation.

In 1964, the City of Buffalo Board of Education ("the Board of Education") fixed the attendance zone for a newly constituted junior high school, selecting a plan for that zone which resulted in the school being over 90% black. Certain parents of Buffalo school children took an appeal to the Commissioner of Education, a proceeding provided for in the New York Education Law, alleging that the Buffalo public school system ("BPSS") was racially imbalanced, that the Board of Education had failed to take action to alleviate imbalance and that there was also discrimination against blacks in the recruitment and distribution of teachers. As to the latter charges, the Commissioner found no supporting evidence was

presented. The Commissioner on that appeal found de facto segregation to exist in the Buffalo Schools. (Matter of the Appeal of Yerby Dixon, Ed. Dept. Rep. 115.)

In his decision in Yerby Dixon, then Commissioner Allen found (p. 118):

"It must be apparent to the petitioners, however, as well as to everyone else concerned, that there is not and cannot be an easy or instant solution to the problem which is the main thrust of this appeal. Involved in the ultimate solution to de facto segregation in a school system is of course the elimination of segregated housing, slum conditions and other undesirable socio-economic conditions which lie beyond the control of the board of education or of the Commissioner. Not only is the problem per se a complex and difficult one in Buffalo, but the Board of Education is handicapped by the fact that it is by law fiscally dependent on the municipal government, and that the city school district is severely restricted by the constitutional tax limitation."

Those limitations are no less true today and there is no question but that they have severely limited the progress which could be made in racially balancing Buffalo schools.

In that appeal, the Commissioner ordered (pp. 118-119):

"Jurisdiction over this appeal is retained by me pending the adoption by the Buffalo Board of Education of a plan for mitigating the problem of racial imbalance which meets with my approval. Furthermore, I am reserving the right to make such further order or orders in this case as shall be necessary to effectuate a plan approved by me.

"It is ordered that the Board of Education of the City School District of the City of Buffalo prepare, approve and submit to me on or before May 1, 1965, a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction beginning with the school year 1965-66."

Initial attempts to implement racial integration were the immediate subject of legal challenge. This Court in Offermann v. Nitkowski (378 F. 2d 22 [1967], aff'g 248 F. Supp. 129) recognized that there is no constitutional duty to undo de facto segregation in the schools, but upheld the constitutional right of the State to elect to do so and to direct compliance by local school districts.

In the February 1965 order, the Commissioner directed that a plan for elimination of racial imbalance be submitted to him by May 1, 1965. The report was submitted by the Board on May 1, 1965 and objections thereto were filed on behalf of the appellants in Yerby Dixon. A hearing was held by Commissioner Allen on August 18, 1965 and his findings were sent to the Buffalo Board of Education by letter dated October 8, 1965 (Ex. 160, Ex. III thereto). In that letter, Commissioner Allen stated:

"I find the report submitted by the Board for the progressive elimination of racial imbalance disappointing. It fails to come to grips realistically with the problem and to present a long range solution or to identify the barriers which must be overcome in order to reach a solution. I do not feel that the Board's report deals in sufficient depth with the large and complex problems facing the school system."

The letter points out that a meeting was held in Buffalo between the Commissioner, the President of the Board of Education and the Superintendent of Schools which was followed on September 22 by a statement requesting the assistance of the State Education

Department in the preparation of a plan to eliminate racial imbalance. The Commissioner appointed the Associate Commissioner for Research and Evaluation to work with the Board of Education on such a plan.

In January 1966, the Commissioner appointed an Advisory Committee for the Study of Buffalo Schools, chaired by Ira Ross, President of the Cornell Aeronautical Laboratory. Arrangements were made for a study to be made by the Center for Urban Education, a national educational laboratory, supported by Federal funds appropriated under Title IV of the Elementary and Secondary Education Act of 1965. The report, entitled "A Plan for Accelerating Quality Integrated Education in the Buffalo Public School System" was transmitted to the Board of Education on August 23, 1966 by Commissioner Allen (Ex. 160, Ex. III thereto).

On September 14, 1966, the Buffalo Board of Education approved the plan "in principle" (Ex. 160, Ex. III). On the same date, Commissioner Allen wrote to the president of the Buffalo Board of Education requesting that the Board file with him, by October 15, 1966, its plans for elimination of racial imbalance (Ex. 160, Ex. III). This deadline was subsequently extended to November 15, 1966 (Ex. 160, Ex. III).

On November 3, 1966, the Superintendent of Schools submitted to the Board of Education a plan for racial balancing of the schools, generally referred to in this litigation as "The 16 Point Plan" (Ex. 160, Ex. III). The basic proposals of this

plan were neighborhood schools for first 5 grades, ultimately K-4; assignment of inner-city pupils in Grades 6-8 to schools in peripheral areas of the city; construction of West Hertel School as a middle school; plan and construct a new eastside high school; and one demonstration middle school to open in September, 1967. The remaining proposals were primarily programs in compensatory education for inner-city pupils.

The primary differences between the CUE proposal and the Board proposals were the proposal for an educational park at the old State University campus, a greater emphasis on faculty and administrative integration; and the consolidation of all schools into 5 districts with educational parks (Ex. 160, Ex. III).

The Board report was submitted to Commissioner Allen on November 14, 1966 (Ex. 160, Ex. III).

Special state-aid for integration assistance was approved for Buffalo for the 1966-67 school year in the amount of \$130,558.50 for project SITUP at School 54 and for coordination of integration (Ex. 160, Ex. III).

On June 7, 1967, Commissioner Allen again wrote to the President of the Buffalo Board of Education pointing out that the Buffalo recommendations had been the subject of a hearing at which all parties to the Yerby Dixon appeal were given an opportunity to be heard and submit additional data. As to the Board proposal, the letter states (Ex. 160, Ex. III):

"The latest recommendation and accompanying materials submitted by the Board have been reviewed by the staff of the Department and by me and, I am sorry to say, are found to be disappointing and unsatisfactory, lacking in specificity and devoid of any real evidence of a serious intent on the part of the Board to reduce significantly racial imbalance in the Buffalo School System."

Commissioner Allen directed then Deputy Commissioner Nyquist and staff members of the Education Department to visit Buffalo and consult with the Board concerning the kind of plan and program of action which would be needed (Ex. 160, Ex. III). That meeting was held in July, 1967 after which Deputy Commissioner Nyquist wrote to the President of the Board of Education setting forth in detail the areas of disappointment with the Board's recommendations (Ex. 160, Ex. III). Those were 1) a lack of a detailed comprehensive plan with a definite timetable for action; 2) a lack of practical steps to educate public opinion toward integration; 3) a lack of depth in the integration planning staff of the Board; and 4) "the submission of a full plan has taken more time than seems warranted under the circumstances" (Ex. 160, Ex. III). The date of November 15, 1967 was set as the date for submission by the Board of a timetable for development and carrying out of an integration plan. That was eventually changed to require an interim report by November 15 and a final report by December 15 (Ex. 160, Ex. III).

On November 15, Superintendent Manch submitted an interim report (Ex. 160, Ex. III). The report listed as accomplishments the creation of an Office of Integration in the city school system; the transfer in September 1967 of 800 pupils in the 6th, 7th and 8th grades from inner city schools to peripheral schools; in-service training programs for teachers and administrators in receiving schools; the use of educational TV for a program on quality integrated education; an orientation program for children to be transferred; the conversion of Fillmore Junior High School to a middle school to have a racial balance of 1/3 black to 2/3 white; remedial programs for transferred pupils; plans for expanded curriculum at McKinley High School to serve as a comprehensive coeducational high school with both academic and vocational courses; the sponsorship of a county-wide conference on equality of educational opportunity; and the establishment of an advisory council on integrated education (Ex. 160, Ex. III).

The December 15 deadline was extended at the request of the Board to January 31, 1968. A subsequent request was made for a further extension to March 1, 1968 (Ex. 160, Ex. III). Commissioner Allen directed that a plan be submitted by January 31 to be updated on March 1 and to constitute the Board's "firm commitment" (Ex. 160, Ex. III). On January 30, 1968, the Board transmitted its recommendations to Commissioner Allen (Ex. 160, Ex. III). The Board recommended the organization of the school system

into a 6-4-4 program. The six-year unit to include pre-kindergarten and Grades K-4, to be housed in neighborhood schools. When neighborhood schools in inner-city require replacement, they would be built in peripheral areas where an integrated student body could be enrolled. The Board recommended a middle school program of 15 schools to be integrated $\frac{1}{3}$ black and $\frac{2}{3}$ white. These would include Fillmore, which had been converted to a middle school, conversion of Genesee-Humboldt and Southside Junior High Schools to middle schools and the construction of 12 new schools. Woodlawn would be developed as a "magnet school" and Clinton discontinued and its student body dispersed.

As to secondary schools, the Board recommended inclusion of all ninth grades in the high school buildings, study of high school programs, expansion of vocational courses; construction of a comprehensive high school on southeast side of the city, development of a school at Main and Delevan, development of a plan to either integrate East High or distribute its pupils in other high schools, and open enrollment at all high schools on a city-wide basis. The Board recommended planning for an educational park or parks, including a metropolitan educational park, if possible.

The Board proposed a school construction schedule which would open the West Hertel Middle School in September, 1969; add a 5th grade to Fillmore in September, 1970; open the new Main-Delevan High School and the new East Side High School in September, 1971; Genesee-Humboldt and Southside Junior High

Schools would be converted to middle schools by September, 1971; and between September, 1971 and September, 1973, at least 4 additional middle schools would be opened each year.

Recommendations for staffing included placement of more black teachers in white schools, and increased emphasis on recruitment of black teachers.

It was estimated that annual expenditures for the school system for operation and debt service would equal \$79,000,000, an increase of \$22,000,000 over 1967 revenues. The Board pointed out that the city budget was within \$500,000 of its tax base and that base was shrinking.* The Board anticipated a 10% increase in state aid and local tax support at the rate of \$12 per \$1000 of taxable real property, leaving a budget deficit of \$6,000,000. The Board's only hope to meet that deficit was increased State or Federal aid.

On May 21, 1968, Commissioner Allen replied to the Board's recommendations (Ex. 160, Ex. III). In his letter, the Commissioner stated:

"The January 31, 1968 report presents a comprehensive plan for improved racial balance with a definite timetable for action."

After recapitulating the major points of the recommendation, the letter concluded:

* It should be noted that the City of Buffalo is now spending far beyond its tax limit by virtue of legislative devices which have been challenged as unconstitutional.

"After a detailed examination of the Board of Education report of January 31, 1968 and considering the continuing action of your Board and staff, I ask that you continue planning and acting toward the progressive elimination of racial imbalance; and that you transmit to me as of November 15, 1968, a report of action taken toward meeting the plans and any further amendments or improvement in planning which affect the policy of the Board of Education."

In accord with that directive, on December 2, 1968, Superintendent Manch transmitted a proposed progress report which had not yet been acted upon by the Board (Ex. 160, Ex. III). The document reported that 2,043 students were being transported from inner city schools to peripheral areas and that the program had been extended to children in grades K-3, with 25 children initially transferred. The final approval of the West Hertel Middle School bond issue by the Common Council was reported and the anticipated opening of the school as an integrated facility in September, 1969. The Board had planned to use portable classrooms to further the integration program to add classroom space to schools receiving pupils transferred from the inner city schools. However, the Common Council amended the zoning laws to prohibit their use. The Board brought legal action challenging the ordinance. At the time of the report, the Board had been successful in the Trial Court, but no decision had yet been received from the Appellate Division.

The Board had requested \$380,000 in bond funds to finance preliminary middle school planning. This request was tabled by the Common Council. Some planning funds were apparently secured from HEW in a study called Project 1990.

McKinley Vocational High School was changed to a comprehensive coeducational high school.

Several proposals for recruitment, placement and in-service training of teachers were reported. The continued success of Project SITUP, an experimental program at School 54 was also reported.

Thus, at the end of 1968, the ordered integration of the Buffalo schools appeared to be on its way to fruition. A plan had been developed which would assure integration and attempts to obstruct that plan had been successfully defeated in the courts.

In 1969, Chapter 342 of the New York Laws of 1969 was enacted by the State Legislature which prohibited an appointive school board from setting attendance zones or assigning pupils for the purpose of racial balance. The Board of Education construed that law as preventing any integration moves except voluntary transfers. Plans were made to implement such voluntary assignments of pupils (Ex. 128).

On June 18, 1969, Dr. Nyquist, as Acting Commissioner of Education, commented on the latest progress report on integration

of the Buffalo schools (Ex. 127). The letter notes that the Appellate Division had affirmed the holding that the zoning change was invalid, thus removing any obstacle to use of relocatable classrooms. It was also noted that the Board had requested \$400,000 in planning funds for middle schools to be included in the city's 1969-70 capital budget. However, the letter also noted:

"The difficulties you described in your report apparently have slowed down the forward thrust of the Buffalo Public Schools in regard to achieving quality integrated education. Your report and other information submitted in the regular reporting system to the State Education Department show that 2,043 students were transferred from the core area to schools in the periphery in the fall of 1968. Unfortunately during the past two years, while the white enrollment in the Buffalo schools was decreasing by 2,045 (4 percent of whites), the Negro enrollment was increasing by 1,042 pupils (4 percent of Negroes). Clearly unless there is an acceleration in the implementation of plans for achieving quality integrated education in the Buffalo School System, the present trend may become irreversible. Despite the progress described in the report, the conditions which prompted an appeal to the Commissioner of Education by the parents of Negro children still exist."

The letter then pointed out the increasing problem of racial separation in the Buffalo schools, the beneficial affects of integration and urged that a voluntary transfer program within the confines of chapter 342 be pursued. Dr. Nyquist requested that plans for the 1969-70 school year be reported within one month.

On July 14, 1969, the Buffalo Board forwarded the requested report and further noted that the Board had directed the Superintendent of Schools to explore cooperation with suburban districts (Ex. 129). West Hertel Middle School would open in September, 1969 with a 70% white to 30% black enrollment; it was anticipated that an additional 450 pupils would be added to the voluntary transfer plan, and 18 relocatable classrooms would be in use in the 1969-70 school year.

Dr. Nyquist's reply of August 1, 1969, noted that forward progress was indicated and requested further reports on December 15, 1969 and May 15, 1970 (Ex. 130).

The December report noted that 2,709 inner-city pupils would be in receiving schools by February, 1970; the use of relocatable classrooms would permit the transfer of 226 pupils from Clinton Junior High School; it was noted that Project SITUP had been successful in maintaining School 54 as an integrated school in a transition neighborhood; West Hertel Middle School had been opened on schedule and Dr. Manch had been meeting with suburban district superintendents to explore cooperation in integration.

On June 29, 1970, the next report was transmitted to Commissioner Nyquist (Ex. 160, Ex. III). In September, 1970 another 400 6th and 7th grade inner-city children would be transferred to peripheral schools with a total of over 3,000 such children transferred for the next school year; cooperation

was still being explored with suburban districts; a new middle school program of six, instead of 12, schools had been proposed by the Center for Urban Education; and Bennett, Lafayette and Grover Cleveland High Schools would be redistricted to further integration of those schools.

The report indicated progress being made in 1970 toward integration of Buffalo schools which, if carried through, would have achieved the aim of the Commissioner's 1965 order.

These proposals on integration were ineffective in some instances, not because of Board action, but because of extraneous influences. For example, plaintiffs' witness, Gardner, a former president of the Board of Education, testified that the portable classrooms had some effect on integration but that "sooner than it was expected, * * * it ceased to be a meaningful contribution to integration, largely because of population movements within the City" (322*). Additionally, he testified that the major cause of segregation at East High School is residential pattern (374-375).

Unquestionably, the basic proposal of the Board of Education for integrating the schools was the Middle School program. Gardner testified as to that (341):

"If we had built the middle schools, it would have had a considerable effect on racial balance."

* Numbers in parenthesis, unless otherwise indicated refer to page numbers of the joint appendix on this Appeal.

Although the Board continually requested funding for those schools the Common Council failed to appropriate required moneys (R. II, pp. 70-71). Even when funds were appropriated in 1972 or 1973, they were not usable by the Board until all necessary moneys for construction were appropriated (341-342).

In December, 1971, a letter from the Buffalo Citizens' Council on Human Relations to Commissioner Nyquist contended that the Common Council would not appropriate necessary school construction funds, and that the Board of Education would not change its plans for integration even though the Common Council inaction had made the plan impossible to carry out, and, indeed, that the Board had failed to carry out some of its other promises that did not need funding (Ex. 41).

By letter dated January 20, 1972, the Commissioner wrote to the Board (Ex. 42):

"I ask that you strengthen your efforts to develop a plan different from the one originally formulated as a consequence of the Yerby Dixon appeal. I do not suggest that eventual implementation of a 4-4-4 plan of organization be precluded, but do strongly urge the elimination of segregation in the early grades where integration is most easily achieved and most effective in the lives of children."

The Commissioner requested the Board to submit, by April 1, 1972, a new desegregation plan which would substantially reflect the racial composition of the entire district with an interim report by February 15, 1972 on progress.

On March 23, 1972, the Board advised the Commissioner (Ex. 51):

"We regret to advise you that we are unable, consistent with our responsibilities as we see them, to submit any plan to you by which, within the period of time you apparently have in mind, '* * * every school would substantially reflect the racial composition of the entire district. * * *'"

On March 28, 1972, the Board "received and filed" a staff report entitled "A Study of Desegregation" (commonly referred to as the "Heck Report") (Ex. 47). At the same meeting the Board expressed itself as opposed to "any form of forced busing". The following day, Arnold Gardner, who was then President of the Board of Education wrote the Commissioner alleging willful refusal on the part of the Board and listing what he contended were acts of de jure segregation on the part of the Board (Ex. 50).

On April 6, 1972, Commissioner Nyquist advised the Board that he was directing members of his staff to work with the Board in developing a desegregation plan (52). On May 22, 1972, the Commissioner's task force arrived in Buffalo and remained for two weeks.

On November 8, 1972, the recommendations of the task force, in the form of a plan for desegregation, were transmitted to the Board by Commissioner Nyquist with a request for response by January 3, 1973 (Ex. 131).

For grades K-8, the plan proposed two alternatives. The first was the Heck plan proposal; the second added elements to that plan. The plan would create 5 districts, all including a part of the

black residential section of the city. Within each district a 4-4-4 plan would be established, with all schools integrated from K-12. All children would be transported for only 4 of the first 8 years of school. The second alternative would divide K-8 grades into 3 sections with all schools in a district serving the same grade levels located as close together as possible. This would involve more busing than the first proposal. Under the first plan the annual cost for busing for integration would be \$2,874,716; after the first year, State reimbursement would reduce the city's cost to \$287,472. The cost of transportation in the second plan would approximate \$4,000,000 in the first year, with subsequent annual costs of \$400,000. It was anticipated under the Heck plan all schools could be integrated by September, 1974 and a year earlier under the second alternative.

The Board voted to "receive and file" that report as well and to advise the Commissioner that the Board "did not find in the report any basis for a solution of the problem before it" (268).

Of course, by this time not only was the instant action pending (commenced June 26, 1972) but also an HEW complaine review which was commenced in February, 1971 and was the subject of Gilbert Francis' testimony (525, et seq.).

B. Commissioner Nyquist's testimony

Testifying in the trial in the instant case, the Commissioner described his powers and duties as Commissioner of Education (744-747):

"A. I have two functions. One is the Chief Executive Officer under the Board of Regents as head of the State Education Department and I have an administrative capacity there. I also have a quasi judicial capacity. I can hear educational grievances based on educational matters anywhere in the State at the elementary and secondary level and also anything arising in the City University of New York.

"Q. Over what kinds of subject matter do you have jurisdiction, what do you deal with?
A. Well, we have regulatory responsibilities based on law, obviously, with respect to supervision of schools, accreditation of schools and colleges, public libraries, museums. We have developmental responsibilities, coming up with programs funded by the Federal Government or by the State. We provide technical assistance to local school districts.

"Q. Technical assistance with respect to what kinds of matters? A. Anything; better school business management, curricular development, custodial functions, orientation of new School Board members, a whole host of things.

"Q. Now, what powers and responsibilities do you have specifically over matters of racial balance in the schools?

* * *

"A. Well, the Board of Regents has adopted a policy of, - in favor of, - strongly in favor of racial integration and under that policy in the appeals that have been brought to the Commissioner of Education, I think it is under Section 310 of the Educational Law I have heard those appeals and the Commissioner has the power as sustained by, - in the courts of the State and to the Supreme Court to order desegregation of schools."

One of the plaintiffs' contentions relating to State liability has been based on an allegation that the Commissioner has the power to approve school sites and construction and that, using Woodlawn as the sole example, he had approved a site which would inevitably result in a segregated school. However, plaintiffs' own witness, Lydia Wright, a former member of the Board of Education, testified that an attendance zone for Woodlawn Junior High School could have been designed to result in an integrated school (585-587). Plaintiffs cannot rely on the stipulation which was based on the examinations before trial in this respect since they introduced the contradictory testimony at the trial. Additionally, the site for Woodlawn was selected before the Yerby Dixon decision, since the racial composition of that school was specifically referred to in that appeal. The Commissioner does not have any function in the determination of school attendance zones (797-798).

Commissioner Nyquist testified that, although, except as to the City of New York, he technically has the power to approve school site selection and construction, he does not exercise it in the case of the big four cities, including Buffalo. The power being permissive, rather than a mandate to approve, the Department has elected not to exercise the power in the big cities and to concentrate the use of the power in smaller districts (778-780). In fact, the power has not been utilized as to the big cities in all the years the Commissioner has had that discretionary authority (779-780).

The Commissioner also testified that, because of the lapse of time since the 1965 order, before making a final order relative to desegregation he had proposed to hold a hearing on a show cause order and that that hearing and those relating to other school districts had been postponed because of the Commissioner's hospitalization in the spring of 1974 (780-781). The show cause orders were subsequently issued and hearings scheduled relative to 5 school districts in the State including Buffalo.

As to some cities, final desegregation orders have been issued. The hearing relative to Buffalo resulted in the approval of a desegregation plan submitted to the Court below as a proposed remedy in the instant action. He further testified as to events which occurred since he took office in 1969 (782-785):

"Beginning since I became Commissioner and I think in the preceding questions, we brought that out. The law was passed just before I became Commissioner which eventually was declared unconstitutional which prevented me from doing anything about racial integration really, except encouraging it. I can do that, and when that was cleared up, I decided to take a little different tact from my predecessor and that is to involve the community and try by persuasion to get a plan developed. It is a much better, sounder way of going about it and that took time. It was, - and I also wanted to build, let the Board and the community have, - the Board, really, because they are in charge, give them every possible opportunity so that looking towards in the kind of political climate we had at that time, including Mr. Nixon's stand on busing, looking toward the time that if an appeal were taken by the Board, I would have a sound, reasonable, painstaking legal record of what had been done. Just about that time, my Director of Division of Intercultural Relations who does this

work had a heart attack and died and that also held us up and we were short of staff, and then in '73 bringing it down to that time, we had a couple of new Regents on the Board and they wanted to be involved in the proceedings and to see if they couldn't help and I think here in Buffalo that was the case, and that brings down, that took some more time. That brings it down to April of '74 when I had already issued three show cause orders in three other communities and two more to go and one of them was Buffalo and I had a heart attack and I didn't recover fully from that until July.

"Q. Is that July '74? A. Yes, this year. By that time, on advice of counsel and my Deputy Commissioner and my own conviction, I didn't think that we should issue an order for, - you know, opening of school coming the first of September and so that we waited then for the Supreme Court decision to see if the Detroit case would help us any and it didn't and then along about that time, finally the Regents themselves raised the question, a couple of the Regents, should they not review their racial integration policy. We have had the exhibits here and I expect them and because I was not going to issue a final order if that was the outcome of a show cause order on a hearing, because I wouldn't issue it for the opening of school in '74, I just decided to wait and the Regents are going to come out with their new policy and in a sense of after reconsidering it, they may reaffirm it. I don't know what they will do. I am hopeful they will reaffirm it. That will come at the end of October. I think that's the whole story covering the five years I have been Commissioner."

The Regents did in fact reaffirm their prior position as to racial balance.

The Commissioner further testified that after a show cause hearing, he could issue a final order relative to desegregation of the schools. Testimony then proceeded (786):

"Q. * * * Now, when you issue this final order, Dr. Nyquist, and if you did issue a final order after such a hearing, which was disobeyed, is that the time that you consider taking the steps of exercising your powers of sanction?

A. Yes. That is true. I mean, you can't take away State aid or ask or try to institute proceedings through Board members until you have issued a final order and that hasn't been done."

On October 10, 1973, Dr. Nyquist issued a report to the Regents concerning his integration reports which included Buffalo as well as other communities (Ex. 151). The part of the report concerning Buffalo recounted the recalcitrance of the Board of Education in 1972 and 1973 and rejection of integration plans advanced by the Commissioner. It then concluded (920-921):

"Because of this impasse, the Commissioner was left no alternative but to order the Buffalo Board of Education to implement a plan of desegregation prepared by the State Education Department. Accordingly, on August 2, [1973], the Division of Intercultural Relations submitted to the Deputy Commissioner two copies of a draft of a show cause order for desegregation of the Buffalo Schools. The order is currently [10/10/73] in office of counsel. It embodies the essential elements of the study prepared by our staff in 1972. Meanwhile, Regent Genrich has been making an attempt to obtain cooperation of the Buffalo Board of Education."

Decisions Below

- A. Addition of Individual Members of the Board of Education and Board of Regents as parties defendant, April 30, 1976, June 10, 1976

In their post-trial brief to the Court below, the State defendants had contended that the discriminatory acts which plaintiffs had alleged in their complaint and attempted to prove at the trial were acts of units of State and local government, not of individual defendants, in which instance the Court would have no jurisdiction of an action brought solely pursuant to 42 U.S.C. § 1983.

After the trial and submission of briefs, plaintiffs moved for leave to amend their complaint to add as parties defendant the individual members of the Board of Education of the City of Buffalo, all of whom were elected after the action was commenced, and the individual members of the Board of Regents, a majority of whom had been elected after the action was commenced - some actually after the close of the trial.

By decision and order dated April 30, 1976, the same day as the decision on the merits of the action, the Court below granted the motion (1019-1029)*.

The Court acknowledged that § 1983 jurisdiction did not lie against municipal corporations, including school boards, but then granted the motion to add individual defendants, rejecting defendants' argument that individual defendants, for the purpose of jurisdiction,

*The Court, in its decision, stated that the jurisdictional question was first raised in the post-trial brief. In fact, the issue was raised in defendants' motion to dismiss the complaint filed August 3, 1972 and heard before former Judge Henderson.

must be the actual persons or officials who acted to deprive plaintiffs of constitutional rights (citing Rizzo v. Goode, 44 U.S.L.W. 4095 [Jan. 20, 1976]) and that the individuals sought to be added were not such actual persons under the proof presented at the trial and indeed most could not be since they were not in office at the time of the acts complained of.

The Court rejected defendants' construction of Rizzo and held that State and municipal officers are "persons" within the meaning of § 1983 when sued in their official capacities, even though the acts complained of are those of the State or municipal body, rather than those of the individuals. The Court apparently made no distinction between addition of individual parties defendant before a trial, giving prima facie § 1983 jurisdiction, and addition after trial of individual defendants unconnected by the proof with the acts complained of.

By order dated June 3, 1976, the District Court clarified its April 30 order holding that the individual defendants were added not in their individual capacities, but in their official capacities only.

B. The Motions to Reconsider

By notices of motion filed June 15, 1976 and August 31, 1976, the State defendants moved for reconsideration of the Court's April 30 decision relative to adding parties defendant and § 1983 jurisdiction. That motion was denied by decision and order dated December 10, 1976.

Denying the motion, the Court acknowledged that school boards, as well as other municipal and State bodies, are not "persons" within the meaning of § 1983 jurisdiction (1289-1290). However, the Court then proceeded to hold that since individual members make up a board, they may be sued for the acts of the board -- whether or not they were members of the board when the actions complained of were taken. In that respect, the Court held (1290):

"Notwithstanding this strict construction of § 1983's subject matter jurisdiction requirements, when a plaintiff performs the requisite procedural formalities and sues the individual members of a school board, the suit then proceeds as if it were against the board as an entity. This makes logical and practical sense because the board only acts as a body. Furthermore, as this court has pointed out before, if only the actions of individual board members could be considered, and individuals held liable for them, corporate entities such as a school board could continually escape liability by changing their membership."

That conclusion appears contrary to the very case cited in the opinion, that is, Mayor of Philadelphia v. Educational Equality League (415 U.S. 605 [1974]) which held that prospective injunctive relief, such as that awarded in the instant case, could not be awarded against a successor officer without proof that he will continue the practices of his predecessor (1293), no such proof having been introduced in the instant action. The Court discounted that decision and another (Spomer v. Littleton, 414 U.S. 514 [1974]) on the ground that they involved the personal acts of the

officers and that in the instant action "we are dealing nonetheless with an entity and that entity's continuing actions and failures to act" (emphasis added) (1294). That distinction would appear to deprive the Court of § 1983 jurisdiction.

C. Decision on the Merits

The Court initially recognized that the question which had to be proven by plaintiffs on the trial was whether segregation in the Buffalo schools was brought about by "purposeful or intentional segregative acts" (1043); citing Keyes v. School District No. 1 (413 U.S. 189 [1973]) in which the Supreme Court of the United States held that "the differentiating factor between de jure segregation and so-called de facto segregation * * * is purpose or intent to segregate" (413 U.S., p. 208). The Court then stated its construction of the proof necessary to show intent (1044):

"In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even 'badness' or 'goodness' on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in Hart v. Community School Board, 383 F. Supp. 699 (E.D.N.Y. 1974), aff'd 512 F. 2d 37 (2d Cir., 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. In Hart, the district court found that the school board had unconstitutionally segregated a school despite the court's specific finding that the school board was not racially motivated. The board appealed this decision. The Second Circuit stated:

'Unless the Supreme Court speaks to the contrary, we believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation.'
Hart, supra, 512 F.2d at 50."

The Court thus clearly relied upon the "natural and foreseeable consequence" test to determine intent.

The bulk of the Court's opinion deals with an evaluation of acts of the city defendants, rather than the State defendants*.

It is significant, however, to take note of the Court's conclusions as to the Buffalo Board of Education and the Common Council (1132):

"The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.

"The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration."

*In view of stipulation No. 141, shown supra to be erroneous by plaintiffs' proof as to districting of Woodlawn School, it is significant that the Court specifically found no racially segregative intent in the citing of Woodlawn Junior High School (1086).

Dealing with its view of the State defendants' responsibility for segregation in the Buffalo schools, the Court relied primarily upon their power of supervision of the educational system of the State rather than upon specific acts (1133), stating (1135):

"The actions of both the State Regents and the Commissioner of Education over the past two decades, and particularly since 1965, weave a saga of much talk and insufficient action, at least as far as the BPSS is concerned."

Concerning the directive of former Commissioner Allen to the Board of Education, mandating that the Board devise integration plans, and the continued efforts to secure cooperation from the Board, the Court stated (1139-1140):

"This court does not quarrel with the initial decision to defer to local authorities to solve what is admittedly a complex and demanding situation. Chief Justice Burger has suggested that 'local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.' Milliken v. Bradley, 418 U.S. 717, 741-42 (1974). Both the Commissioner and the Regents acknowledge this concept. (PX 304, at 2). But, when effective local action is not forthcoming, and no reasonable person could expect that it will be forthcoming, and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves. Deference to local authorities is not an absolute and binding requirement. It is a policy decision with a defined and limited rationale, i.e., that the local authorities have a greater degree of knowledge and insight into the complexities of local concerns. However, when the local authorities refuse to accept the responsibility that is theirs, State authorities have no recourse but to act. Neither the Commissioner nor the Regents did so in the case of the Buffalo public schools."

The Court then reviewed what had occurred in the years since the decision in Yerby Dixon, supra. In this respect, the Court detailed the Board of Education plan of January, 1968 (1143-1145), and observed that the plan would have effectively integrated the fifth through twelfth grades (1144). Difficulties which occurred in 1968 in the implementation of that plan relative to portable classrooms and the middle school plan - the heart of the integration plan - was clearly attributed by the Court to the Common Council (1145). As to the 1968 plan, formulated three years after Yerby Dixon, the Court concluded that "Had it been implemented, integration could have been achieved on a broad scale" (1147). Similarly, the Court attributed the Council's failure to negotiate for the purchase of Bishop Ryan High School to segregation motives of the Council, not of entities within the jurisdiction of the State defendants (1150).

The Court's criticism of the State defendants rested mostly upon what the Court considered to be a failure to take strong decisive action. However, commenting upon defendant Nyquist's letter of January 1972, ordering the Board of Education to devise a new plan integrating all grades to reflect in each school the racial composition of the entire district, the District Court stated (1155):

"Following seven years of weak leadership and continued acquiescence in the Board's dilatory actions, this stern and comprehensive order provoked, perhaps predictably, a strong and divisive reaction among Board members."

That reaction prompted the Commissioner to send a State task force to Buffalo to develop a plan to be submitted to the Board, thus removing further initiative for integration planning from the Board of Education (1156-1157). That plan was, as the Court noted, rejected by the Board of Education in January, 1973 (1157).

While the Court was critical of the Commissioner's failure to remove members of the Board of Education or withhold State aid from Buffalo (1159-1160), the Court also recognized that no final order yet had been issued pursuant to which the Commissioner could take that action (1160).

As to the State defendants, the Court found no affirmative acts of segregation, but rather concluded (1162):

"At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 Yerby Dixon Appeal and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools."

The Court's finding of State liability was thus based not on segregative acts or intent but rather on lack of success in achieving integration of the schools in Buffalo.

The Court's conclusions are, when compared to the proof, themselves revealing (1165):

"As the Supreme Court has often noted, 'it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.' Palmer v. Thompson, 403 U.S. 217, 224 (1971). The same can be said for the

motivation or motivations behind the actions of a school board or board of regents. When, however, the court is faced with a decade and more of intransigence and obstruction, of delay and procrastination, the interpretation of motivation becomes less difficult. The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS."

and (1167-1169):

"[T]he failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools -- all of these are evidence of a systematic program of segregation."

The State defendants are thus held liable for a lack of effective action - rather than an intent or purpose to segregate.

D. The Decision of March 1, 1977

Subsequent to the December 7, 1976 decision of the Supreme Court of the United States in Austin Independent School District v. United States (50 L. Ed. 2d. 603), the District Court in the intent action requested the parties to brief Austin and Washington v. Davis (42 U.S. 229 [1976]) as they might apply to the instant decision in Village of Arlington Heights v. Metropolitan Housing Development Corp. (50 L. Ed. 2d. 450), which was also considered by the parties.

The District Court then proceeded to hold that the "natural and foreseeable consequences" test may be utilized to demonstrate the discriminatory intent required by the decision in the above cited cases (1317). The Court then reconsidered its April 30, 1976 decision and concluded that it had there found intentional discriminatory acts on the part of defendants. As to the State defendants, the Court now found (1323-1325):

"REGENTS AND COMMISSIONER NYQUIST - This court has already considered one request from the Regents and Commissioner Nyquist to amend its April 30, 1976 decision and find them innocent of any racial discrimination with regard to the B.P.S.S. The court declined to do so then, and it declines to do so now.

"The Regents and the Commissioner, through their action in the early and mid-1960's, put the B.P.S.S. on notice that segregation must be remedied. Barring a lawsuit, if the Board of Education refused to act, only the Regents and the Commissioner could force their hand. Conversely, if the City officials were reluctant to act, as they proved to be, inaction by State officials could only encourage the City to continue its old ways. The Regents and the Commissioner were well aware of this. Nevertheless, alleging that they did not bring about the segregation in the B.P.S.S., the Regents and the Commissioner contend that their encouragement and requests that segregation be ended are sufficient to absolve them of liability. This reasoning is fallacious.

"In New York State, as this court has explained before, public education is the province of the State Department of Education, which is governed by the Regents and whose chief administrative officer is the Commissioner of Education. Commissioner Nyquist admitted at trial that only action by the Commissioner or by this court could accomplish desegregation of the B.P.S.S. The Regents must have been aware of this also. Certainly they knew that it was a rare day when a school district voluntarily integrated its schools. 415 F.Supp., at 951, n.48. The Commissioner also testified at trial that the Board of Education's actions 'clearly and unequivocally violate the Regents policy.' 415 F.Supp., at 958.

"It may be, as the Regents and the Commissioner urge, that when state officials have been completely uninvolved with a school district, they should not be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action. Their subsequent failure, over more than a decade's time, to require compliance with their directives served to continue and exacerbate the racial

isolation in the Buffalo public schools. The court could only conclude from the Regents' and the Commissioners' actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated. The Regents' continued reliance on their plethora of policy statements urging an end to school segregation is disingenuous. It hardly needs restating that actions speak louder than words."

Those findings appear to fall far short of the intent required by the cited Supreme Court decisions.

Summary of Argument

It is the initial contention of the State defendants-appellants here, submitting this brief that the District Court lacked jurisdiction of the subject matter of this action by virtue of the fact that only institutional discrimination has been proved, not acts of individual defendants, and that consequently, regardless of how they are denominated, the real defendants are the State and municipal entities involved which are not "persons" within the meaning of 42 U.S.C. § 1983.

Further, these defendants contend that, even if the District Court had jurisdiction, the proof did not meet the segregative "purpose and intent" test laid down by the Supreme Court of the United States; that, as to these State defendants-appellants, they are charged with and proven to have merely failed to secure integration of the Buffalo schools, and that failure in an undertaken task does not constitute unconstitutional discrimination.

ARGUMENT

POINT I

THE ACTS OF SEGREGATION WHICH PLAINTIFFS ALLEGED IN THEIR COMPLAINT AND ATTEMPTED TO PROVE AT THE TRIAL ARE THOSE OF UNITS OF STATE AND LOCAL GOVERNMENT AND NOT OF THE INDIVIDUAL DEFENDANTS. SUCH GOVERNMENTAL UNITS ARE NOT "PERSONS" SO AS TO CONFER JURISDICTION ON THE DISTRICT COURT PURSUANT TO 42 U.S.C. § 1983. PLAINTIFFS HAVE NOT ALLEGED OR ESTABLISHED JURISDICTION UNDER ANY OTHER STATUTE.

In their complaint, plaintiffs alleged that this is a "civil action for declaratory judgment and injunctive relief under Title 42, United States Code, § 1983, et seq." That section provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The defendants, originally named in the action were the Board of Education of the City of Buffalo, the Board of Regents of the University of the State of New York, which are clearly not "persons" and the Commissioner of Education of the State of New York and the Superintendent of Schools of the City of Buffalo. Almost two years after the action was commenced,

plaintiffs moved to add the Mayor and members of the Common Council of the City of Buffalo as parties defendant. It should be noted that when the action was commenced the State defendants, in their motion to dismiss, contended that certain persons, whose acts were alleged in the complaint to be discriminatory, were not parties defendant and that among those were the Mayor and Common Council of Buffalo. Plaintiffs opposed this motion in 1972, but in 1974 moved to add them as parties. The evidence did not, however, establish acts of the named individuals which deprived plaintiffs or their children of rights guaranteed by Federal Constitution or statute.

Evidence relating to acts by the Mayor of Buffalo, it should be noted, concerned the predecessor of the named defendant mayor. One named member of the Common Council is also the principal plaintiff in this action and can hardly be presumed to be suing himself.

Plaintiffs sought to prove acts of the Board of Education as such; of the State, as such; of the Common Council, as such--not the acts of named individuals. Indeed the Court below, in finding that defendants had deprived plaintiffs of equal protection rights referred to "the Board of Education", "the Common Council", "the Regents"--not to individual members thereof. Such units of government are not "persons" within the meaning of 42 U.S.C. § 1983.

In Brault v. Town of Milton (520 F. 2d 730 [2d Cir., 1975]), this Court held that a town is not a "person" for the purposes of jurisdiction under § 1983 (see, also, City of Kenosha v.

Bruno, 412 U.S. 507, 513 [1973]; Monroe v. Pape, 365 U.S. 167, 187-192 [1961]). In that case the plaintiffs argued on appeal that their complaint also stated a cause of action pursuant to the Fourteenth Amendment to the Constitution of the United States; paragraph XVI of the complaint in the instant case also alludes briefly to that provision. This Court in Brault pointed out that for jurisdiction in such a case, the amount in controversy must exceed \$10,000 as required by 28 U.S.C. § 1331(a). In that case, the Court remanded for a determination as to whether the allegation in the complaint, that the jurisdictional amount was present, could be sustained. In the instant case, plaintiffs have not alleged the jurisdictional amount under § 1331 and there remains no element of jurisdiction to be proved.

Granting plaintiffs' post trial motion to add the individual members of a newly elected City Board of Education and individual Regents as party defendants, the Court below clearly acknowledged the accuracy of that interpretation of § 1983. In its opinion on that motion the Court stated (1020-1021):

"In 1972, when this case was instituted, the law was clear that municipalities could not be sued for damages under § 1983, since they were not 'persons.' Monroe v. Pape, 365 U. S. 167 (1961). However, several court decisions interpreted Monroe to allow suits solely for equitable relief, such as the plaintiffs seek here, against municipalities. See Schnell v. City of Chicago, 407 F. 2d 1084 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961). This interpretation of the Monroe case was rejected in June 1973, when the Supreme Court decided the case of City of Kenosha v. Bruno, 412 U. S. 507 (1973)."

The Court also recognized that courts have held that school boards are not "persons" within the meaning of section 1983.

The Court did not, however, dismiss the action as to the governmental unit defendants. Instead, it granted plaintiffs' motion to add additional parties defendant, in this case the individual members of the Board of Education and of the Board of Regents.

Peculiarly, the Board of Education members were all newly elected members of the first elected Board of Education of the City of Buffalo. None of them were shown to have been in office at the time the alleged discriminatory acts occurred nor were any acts of the individual defendants alleged to have contributed to the segregation of the Buffalo schools.

Furthermore, a majority of the individual Regents were not members of the Board at the time that the acts complained of occurred and, in fact, five became members of the Board after the close of the trial. Adding these individuals as defendants in order to confer § 1983 jurisdiction on the Court was clearly a sham. No acts by any of the individual Regents which caused or contributed to the segregation of the Buffalo schools was demonstrated by plaintiffs. Regent Clark testified for the plaintiffs but only to vague discussions and his subjective impressions. The only real act by the Regents which was proven was their reaffirmation of their policy statements in opposition to segregation and testimony that Regent Genrich made efforts

to try to get the Buffalo Board of Education to take steps toward interpretation.

As the Court held in Monell v. Department of Social Services (532 F. 2d 259 [1976]), "the mere substitution of the name of the official for the name of the city on the complaint cannot be used as a subterfuge to circumvent the intent of Congress. Thus, we must consider the suit at hand to have been brought directly against the City and the Board of Education, which, as we have seen, are not 'persons' for the purposes of § 1983." Here too the Court continually refers to acts of the "Common Council", the "Board of Education" and occasionally the "Regents". The action really is, therefore, one against the governmental units not the individuals whose names have been interposed in a last minute attempt to cure a jurisdictional defect.

The Court also rejected the contention that jurisdiction also requires that the named defendants be the actual persons whose acts are complained of.

Defendants contended in the Court below and reaffirm here that the defendants, in order to establish jurisdiction in the Court to determine the action, must be the actual persons who are alleged to have acted to deprive plaintiffs of their constitutional rights (Rizzo v. Goode, 423 U. S. 362 [1976]); Mayor of Philadelphia v. Educational Equity League, 415 U. S. 605 [1974]; Spomer v. Littleton, 414 U. S. 514 [1974]).

In Rizzo, the Supreme Court defined the limits of § 1983. Jurisdiction to "impose liability--whether in the form of payments of redressive damages or being placed under an injunction--only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution". Further, the Court rejected as jurisdictional conduct "failure to act" to eliminate future misconduct by subordinates. The Court distinguished certain school cases, not because they were school cases, but because they involved acts of the defendants to administer segregative State laws, a distinction not applicable here.

In the City of Philadelphia case, supra, the Court rejected, as a jurisdictional basis for the action against a newly elected mayor, proof of discriminatory acts by his predecessor. The Court there held that where there had been a change in administration, "the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor." (415 U.S., p. 622) No such proof was offered on this record.

Finally, in Spomer, supra, the complaint alleged discriminatory acts of and asked injunctive relief against a State's attorney. During the pendency of the action the defendant was replaced by the voters and his successor argued that the case should be dismissed as to him. The Supreme Court held that that motion should have been granted in the absence of any

charge that the policy of the office of State's Attorney is to follow the intentional practices alleged.

Regardless of the holdings in those cases, the Court below denied the defendants' motion to reconsider its decision, stating (1294):

"In this case, despite the procedural formalities that require individual members of the Board to be such, we are dealing nonetheless with an entity and that entity's continuing actions and failures to act."

That sentence, we submit, clearly establishes that the motion to add additional parties should have been denied, the motion to reconsider granted, and the complaint dismissed for lack of jurisdiction.

First, the requirement that individual members be sued is not a "procedural formality". It is a jurisdictional requirement under section 1983 that those individuals whose acts are complained of be sued.

Secondly, as we urged at the beginning, it is indeed "entities" with which we are dealing--and "entities" are not "persons" within the meaning of section 1983.

The District Court lacked jurisdiction of this action. The complaint should have been dismissed. The motion to add additional parties defendant should have been denied. The motion to reconsider should have been granted. The order appealed from should be reversed.

POINT II

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT STATES UNDERTAKE TO ELIMINATE RACIAL IMBALANCE IN THEIR SCHOOLS OR, WHERE THE STATES HAVE ELECTED TO DO SO AS A MATTER OF EDUCATIONAL POLICY, REQUIRE RACIAL BALANCE TO BE ACHIEVED IN ANY TIME LIMIT OR AT ANY SET SPEED.

Insofar as the State defendants are concerned, plaintiffs' only complaint is that, having adopted the Regents policy to eliminate racial imbalance in the schools and having specifically directed the City of Buffalo to desegregate its schools, those defendants have not accomplished desegregation as rapidly as plaintiffs would desire.* That does not, however, constitute a violation of any constitutional rights of the plaintiffs. It is the contention of the State defendants here that the plaintiffs have not proven any violation of the constitutional rights of either the plaintiffs or their children by these defendants which would entitle plaintiffs to any relief as against these defendants.**

The Court below found liability on the part of the State defendants because they had not succeeded in compelling the Buffalo Board of Education by persuasion and negotiation, to

* Nor, as the evidence shows, as rapidly as the State defendants desire.

** Chapter 342 of the Laws of 1969 has no bearing here since the State defendants concededly opposed it; the reduction in State aid for integration, whatever its reason, was by the Legislature, not these defendants, and these defendants have no part in State housing policy.

integrate the schools in the ten years since Yerby Dixon (during four of which the action was also pending) and because Commissioner Nyquist had not taken action which would have enabled him to remove members of the Board of Education or withhold State aid.* None of which amounts to appropriate acts showing an intent or purpose to segregate.

The foundation for all arguments against racial separation in schools is, of course, the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka (347 U.S. 483 [1954]). While that case dealt only with school systems which were de jure segregated, the language of that opinion has been quoted at length on all issues of racial separation and educational opportunity. The statements by the Court in that case are significant to the issues presented here, some twenty-three years later. Discussing the importance of education as a function of government, the Court observed (p. 493):

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."**

* It should be noted that the District Court in the Boston School case observed that the State Commissioner there had withheld State funds but that that also had not resulted in integration of the schools.

** This latter statement clearly does not mean equality of financing, however (San Antonio School District v. Rodriguez, 411 U.S. 1 [1973]).

Having cited the prior decisions of the Supreme Court which had held invalid the exclusion of Negroes from white graduate schools, the Court then held (p. 494):

"Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation of their educational opportunities was well stated by a finding in the Kansas case by a Court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'"

The language above quoted has been frequently cited by those who would argue that the decision in Brown also held invalid de facto as well as de jure segregation. Clearly, however, the Court did not so hold. This is demonstrated by the fact that, in directing reargument as to implementation of the Court's decision, the Court posed one question in part as follows (note 13, pp. 495-496):

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice * " *."
(Emphasis added.)

From that language it is apparent that the Court recognized the validity of school districting, per se, and further recognized that normal geographic school districting could result in some racial segregation. This conclusion has been reaffirmed by the Court's recent decision, in a case arising in Detroit, Michigan, (Milliken v. Bradley, 418 U.S. 717 [1974]). In that case the Court refused plaintiffs' requests to order realignment of school districts to integrate city and suburban school districts, holding such a remedy would be available only if the suburban districts were also unconstitutionally segregated. Consequently, the Supreme Court recognizes that some situations will produce segregation which is not unconstitutional, that is, de facto as opposed to de jure segregation.

In the twenty-three years which have elapsed since the decision in Brown, the Courts have uniformly held that impartially drawn geographical school district lines reflecting residential patterns are not unconstitutional, and that the Supreme Court of the United States has not elected to review such holdings.

In a case arising out of the very Commissioner's order which initiated this case (Offerman v. Nitkowski, 378 F. 2d 22 [2nd Cir., 1967], aff'g. 248 F. Supp. 129), this Court observed (p. 24):

"* * * courts generally agree--that communities have no constitutional duty to undo bona fide de facto segregation."

The effect upon de facto segregation of the decision of the Supreme Court in Brown was discussed at length by the United States Court of Appeals for the Sixth Circuit in Deal v. Cincinnati Board of Education (369 F. 2d 55 [1966]). The Board of Education there had denied that it operated intentionally segregated schools, but refused to take any affirmative action to eliminate de facto segregation. Upholding the Board of Education, the Court discussed the significance of the Brown decision (pp. 58-59):

"The essence of the Brown decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by the Court; it was not indispensable to the decision. Rather, the Court held that segregation of the races was an arbitrary exercise of governmental power inconsistent with the requirements of the Constitution. * * *

"The principle this established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constructed without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

"Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of the existing choices, the school board is certainly not responsible therefor."

In the instant case, no evidence has been introduced to prove that the State of New York maintains de jure segregated school systems. Whatever segregation exists because of housing patterns and economic conditions is not caused by the State defendants and cannot be changed by them.

The Court in the Deal case concluded that there was no constitutional duty on the part of the Board of Education there to bus either black or white children out of their neighborhoods, or transfer classes solely for the purpose of alleviating a racial imbalance which the school board had not caused (see, also, Gilliam v. School Board of City of Hopewell, Virginia, 345 F. 2d 325, 328 [4th Cir., 1965], vacated on other grounds,

382 U.S. 103; Downs v. Board of Education of Kansas City, 336 F. 2d 988 [10th Cir., 1964], cert. den. 380 U.S. 914; Olson v. Board of Education of Union Free School Dist. # 12, Malverne, N.Y., 250 Supp. 1000 [E.D.N.Y., 1966], app. dismiss. as moot, 367 F. 2d 565; Broussard v. Houston Independent School District, 262 F. Supp. 266 [S.D. Texas, 1966]; Lynch v. Kenston School District Board of Education, 229 F. Supp. 740 [N.D. Ohio, 1964]; Webb v. Board of Education of the City of Chicago, 223 F. Supp. 466 [N.D. Ill., 1963]; Henry v. Godsell, 165 F. Supp. 87 [E.D. Mich., 1958]).

Also of particular significance to the problem presented by the instant case, particularly because of the testimony relative to housing, is Bell v. School City of Gary, Indiana (213 F. Supp. 819 [N.D. Indiana, 1963], affd. 324 F. 2d 209, cert. den. 377 U.S. 924). The District Court there pointed out that the problem in Gary was segregated housing and held that racial balance in public schools is not constitutionally mandated. In so holding the Court stated, as to transfers of pupils to achieve racial balance (213 F. Supp., p. 831):

"* * * requiring certain students to leave their neighborhoods and friends and be transferred to another school miles away, while other students, similarly situated, remained in the neighborhood school, simply for the purpose of balancing the races in various schools would in my opinion be indeed a violation of the equal protection clause of the Fourteenth Amendment."*

* It should be noted that the plan of desegregation suggested to the Buffalo schools by the State Commissioner of Education in 1972 would have avoided this objection by requiring all students to be bussed for an equal number of school years.

In two cases arising out of the Buffalo school situation, the Courts have recognized that there is no constitutional duty to undo de facto segregation (Lee v. Nyquist, 318 F. Supp. 710 [W.D. N.Y., 1970], *affd.* 402 U.S. 935; Offerman v. Nitkowski, 378 F. 2d 22, 24 [2nd Cir., 1967]). In the instant situation that principle is no less true. Moreover, as to the State defendants, the issue is whether, having adopted a policy which is not constitutionally ~~required~~, the State must pursue that policy in any particular manner or at any particular rate of accomplishment. Short of reversing or abandoning that policy, we submit, there is no constitutional obligation on the State defendants to meet any timetable in achieving racial balance in the schools of the State. Plaintiffs' sole complaint against the named State defendants was that progress in integration had not met plaintiffs' desires. There is no question but that the State defendants are also not satisfied with progress in the Buffalo schools. The rate of progress, however, does not create an unconstitutional deprivation of rights of the plaintiffs.

In its decision on the merits in the instant action, the Court below initially recognized that the question which had to be proven by plaintiffs on the trial was whether segregation in the Buffalo schools was brought about by "purposeful or intentional segregative acts" (1043), citing Keyes v. School District No. 1 (413 U.S. 189 [1973]) in which the Supreme Court of the United States held that "the differentiating factor between de jure segregation and so-called de facto segregation * * * is purpose or intent to segregate" (413 U.S., p. 208).

Those portions of the opinion of the Court below, quoted at pages 32-33, supra, are, we submit, the basis upon which the constitutional correctness of the Court's decision must be determined.

"Some of the actions and events considered in this lawsuit occurred before many, or in some cases any, of the present public school children first attended school. The passage of time alone does not wipe the evidentiary slate clean, however. The Supreme Court has stated:

' . . . We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional." ' Keyes, supra, 413 U.S. at 210-11.

"If the plaintiffs prove that some schools were intentionally segregated by the defendants, the court must then decide whether the plaintiffs have shown that a substantial portion of the school district was so segregated. If the plaintiffs have proved that the defendants intentionally segregated a substantial part of the school district, this 'creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities.' Keyes, supra, 413 U.S. at 208. It is then incumbent on the defendants to prove that the other segregated schools are not the consequence of their illegal segregative actions as well. The burden so imposed on the defendants is considerable. Mere reliance on an 'allegedly logical, racially neutral' course of action is insufficient."

As to the responsibility of the State defendants for segregation in the schools, the Court found (1167-1169):

"* * * the failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools -- all of these are evidence of a systematic program of segregation.

"Defendants have not met their burden of showing that the instances of segregation were not caused by their design or device. Keyes, supra, 413 U.S., at 210. The evidence of segregative acts, briefly catalogued in the preceding paragraph, demonstrates the inadequacy of the City and State defendants' defenses. * * *

"The State defendants' attempt to wash their hands of any involvement in the segregation that characterizes the BPSS, by claiming they have done all that is legally required of them, is similarly unpersuasive. Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the State defendants. In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation.

"Notwithstanding the culpability of the City and the State defendants, the court does acknowledge that some efforts by all defendants, evidencing various degrees of support for desegregating the BPSS, were shown. Unfortunately, these efforts were too insignificant to alleviate the constitutional harm that had been done."

The Court below appears to have misapprehended the limits of the State defendants' authority over the public schools. The Regents are primarily a policy-making body -- they do not participate in the day-to-day administration of the schools in New York State. Nor does the Commissioner of Education administer those schools. He has supervisory powers and some judicial functions, but primarily the school districts are vested with extensive "home rule" powers in the administration of educational policy in the state.

It is submitted that the premise upon which the Court determined liability, particularly that of the State defendants, was not founded upon proof of intentional segregation or racial motivation but upon a finding that segregation was the "probable and foreseeable result" of defendants' acts and it is that finding,

and thus the basis for the Court's conclusions, which we submit has been rendered invalid by the Supreme Court in its recent decisions.

In Austin Independent School District v. United States, (50 L. Ed. 2d.603 [1977]), the Supreme Court of the United States vacated a judgment of the Court of Appeals for the Fifth Circuit, which had found a constitutional violation in the administration of the schools in Austin, Texas, and remanded the case to that Circuit for consideration in the light of Washington v. Davis (426 U.S. 229 [1976]).

The concurring opinion in Austin, discusses the fact situation which existed in that city (50 L.Ed. 2d p. 604):

"As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city.

"Acknowledging these difficulties, the Court of Appeals, noted that

'[c]ountless efforts by school officials, consultants, and visiting teams have found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of cross-town busing incident to non-contiguous pairing of . . . schools. . . .' App. to Pet. for Cert., at 26.

"The Court of Appeals then concluded that nothing short of extensive cross-town transportation would suffice."

That opinion then analyzes the remedy proposed in the light of the proven wrongs and concludes:

"Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, see *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 217-253 (1973), (Powell, J., concurring in part and dissenting in part), the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.

"The principal cause of racial and ethnic imbalance in urban public schools across the country--North and South--is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing--whether public or private--cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns."

Mr. Justice POWELL's opinion does not indicate that the rest of the majority of the Court had any different views, but rather that the opinion is meant as a guideline to the Fifth Circuit as to the intent of the Court on the remand.

Examination of the Supreme Court's opinion in Washington adds the following for consideration as to the Buffalo decision.

In Washington, the Court stated that the Equal Protection Clause of the Constitution prohibits "official conduct discriminating on the basis of race", but added (48 L. Ed. 2d, p. 607):

"* * * our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."

The Court then cited Strauder v. West Virginia (100 U.S. 303 [1880]), wherein the Court held:

"A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the prescribed race or by an unequal application of the law to such an extent as to show intentional discrimination."

The rule that an "intent to discriminate" must be shown was also stated in Wright v. Rockefeller (376 U.S. 52 [1964]), involving congressional apportionment. As to school segregation cases, the Supreme Court in Washington stated (48 L. Ed. 2d, 607-608):

"The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action * * * the differentiating factor between de jure segregation and so-called de facto segregation * * * is purpose or intent to segregate.' Keyes v. School District No. 1, 413 U.S. 189, 205, 208, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973)."

Having cited the above cases, the Supreme Court specifically rejected the concept that "the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause

absent some justification going substantially beyond what would be necessary to validate most other legislative classifications."

Applying Washington and Austin to the instant case, it is submitted that the finding by the Court below of constitutional violation based solely upon the "probable and foreseeable results" of actions or inactions by the defendants is contrary to the principles enunciated in those decisions. Racial motivation must be shown; segregative intent must be shown.

As to the State defendants no such motivation or intent has been shown on the Record and indeed could not be shown. It is significant to note in connection with the Board of Regents as a body and as to its individual members, the Court below discussed neither action nor inaction by that body. Indeed, no basis appears on the Record or in the opinion for a finding of racial motivation by the Regents - either collectively or individually. The only activity by the Regents, referred to in the opinion, is the adoption of its integration policy setting, as a goal, racial balance in all schools.

As to the Commissioner of Education, the Court's opinion makes no finding of racial motivation or discriminatory intent. The opinion notes only that steps to enforce the Commissioner's 1965 desegregation order were taken too slowly and too ineffectually to meet the timetable the Court would have desired.

In this respect, the opinion overlooks other findings in the same opinion that actions or refusals to act by the Common Council denied needed funds to effectuate integration plans (denials which the Court found not to be demonstratively racially motivated) and that the Commissioner of Education had no jurisdiction over the Common Council or other city officials. The only specific criticism directed against Commissioner Nyquist is that a final order, directing Buffalo to desegregate its schools, was delayed because of his heart attack in 1972. The Commissioner's determination that such an order should be his personal act, rather than a deputy's, is discredited by the Court without regard for the sensitivity to local political reaction which motivated the Commissioner's decision not "to pass the buck" to a deputy. Significantly, this criticized inaction occurred after this action had been commenced and prompt resolution of the problem was presumptively within the power of the Court as well.

None of the criticized actions or failures to act on the part of the Commissioner are sufficient to prove racial motivation or discriminatory intent as required by the Austin and Washington opinions. In conjunction with those decisions, note should be taken of the decision of the Supreme Court in Village of Arlington Heights v. Metropolitan H.D. Corp., 50 L. Ed. 2d., 450 (1977) in which

the Court held that the "natural and foreseeable consequence" test could not be used to invalidate local zoning ordinances and that racially discriminatory intent in adopting the ordinance would have to be shown.

In that most recent decision of the Supreme Court of the United States which bears upon the issue of the evidence necessary to sustain a finding of unconstitutional discrimination, Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, the Court discussed not only the test of unconstitutional discrimination which is to be applied, but also the type of evidence needed to prove such discrimination. The Court there referred to Washington v. Davis, supra, and said that that case had "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. * * * Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." As to the evidentiary standard to be applied, the Court's opinion states (50 L. Ed., 2d, pp. 464-466):

"Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing

the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action--whether it 'bears more heavily on one race than another,' Washington v. Davis, 426 U.S., at 242--may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See Lane v. Wilson, *supra*; Griffin v. County School Board, 377 U.S. 218 (1964); Davis v. Schnell, 81 F. Supp. 372 (SD Ala.), *aff'd per curiam*, 336 U.S. 9 (1949); cf. Keyes v. School District No. 1, 413 U.S., at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Reitman v. Mulkey, 387 U.S. 369, 373-376 (1967); Grosjean v. American Press, 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was

changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

"The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Nixon, 418 U.S. 683, 705 (1974); 8 Wigmore, Evidence §2371 (McNaughton rev. ed. 1961).

"The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed."
(Footnotes omitted.)

In the instant case, the evidence as to the defendants Nyquist, Board of Regents and individual members of the Board fails to satisfy the evidentiary test set out in Arlington. The evidence shows that the Board adopted a policy of racial integration in the schools, that appropriate decisions of the Commissioner of Education upheld that policy, that the Commissioner and his staff were working with the Buffalo school system and others to develop plans for integration in the schools, and that plans had been

.. developed which would have had a substantial impact on racial segregation had the City provided the necessary funding.

Significantly, in the light of Davis and Arlington, the failure of funding, the enactment of obstructive local laws and the appointments made to the Board of Education by the Mayor of Buffalo of persons opposed to substantial integration action were held by this Court not to be demonstrably racially motivated. If the evidence in the Record is not sufficient to meet the Supreme Court's evidentiary test of a racially discriminatory purpose in those instances, then most assuredly the evidence concerning the State defendants also fails to meet that test. Indeed, even if this Court were to hold that the City's acts were taken with a racially discriminatory intent, the proof as to the State defendants would fail to meet the test. Nowhere in the Record is there any proof that the State defendants intended a discriminatory result. The fact that the methods they first employed to secure compliance by the Board of Education were unsuccessful does not meet the needed evidence; nor does the fact that the Commissioner of Education felt it necessary to personally make final determinations in the proceeding constitute such proof; nor does the lack of ultimate substantial result up to the date of the Court's decision, bearing in mind that the Board of Education was for many years appointed by the Mayor and that the Common Council controlled the availability of funds for integration purposes, meet that test.

It is therefore submitted that the orders appealed from should be reversed and judgment entered for the State defendants.

POINT III

THE STATE DEFENDANTS HAVE MADE CONTINUOUS AND CONSISTENT EFFORTS TO TRY TO ACHIEVE RACIAL BALANCE IN THE BUFFALO SCHOOLS AND HAVE NOT FAILED TO TAKE ANY ACTION WHICH IS CONSTITUTIONALLY REQUIRED OF THEM.

The story of the Buffalo school system and the factual happenings which relate to this action have been detailed in the fact statement and will be only briefly summarized here to demonstrate that no cause of action has been proven against the State defendants.

This case has its foundation in the 1965 appeal to the Commissioner of Education, entitled Matter of the Appeal of Yerby Dixon (4 New York Ed. Dept. Rep. 115). The Commissioner on that appeal found de facto segregation to exist in the Buffalo schools and, we submit, the State defendants' responsibility in the implementation of the order rests upon that finding, not upon the evidence presented in this case.

In the February 1965 order, the Commissioner directed that a plan for elimination of racial imbalance be submitted to him by May 1, 1965. The report was submitted by the Board on May 1, 1965 and objections thereto were filed on behalf of the appellants in Yerby Dixon. After a hearing was held by Commissioner Allen on August 18, 1965, his findings were sent to the Buffalo Board of Education by letter dated October 8, 1965, rejecting the report.

In January 1966, the Commissioner appointed an Advisory Committee for the Study of Buffalo schools, chaired by Ira Ross, President of the Cornell Aeronautical Laboratory. Arrangements were made for a study to be made by the Center for Urban Education, a national educational laboratory, supported by Federal funds appropriated under Title IV of the Elementary and Secondary Education Act of 1965. The report, entitled "A Plan for Accelerating Quality Integrated Education in the Buffalo Public School System" was transmitted to the Board of Education on August 23, 1966 by Commissioner Allen.

On September 14, 1966, the Buffalo Board of Education approved the plan "in principle". On the same date, Commissioner Allen wrote to the president of the Buffalo Board of Education requesting that the Board file with him, by October 15, 1966, its plans for elimination of racial imbalance.

On November 3, 1966, the Superintendent of Schools submitted to the Board of Education a plan for racial balancing of the schools, generally referred to in this litigation as "The 16 Point Plan". That report was submitted to Commissioner Allen on November 14, 1966. Special state aid for integration assistance was approved for Buffalo for the 1966-67 school year in the amount of \$130,558.50 for project SITUP at School 54 and for coordination of integration.

On June 7, 1967, Commissioner Allen again wrote to the President of the Buffalo Board of Education pointing out that the

Buffalo recommendations were unsatisfactory. Commissioner Allen then directed then Deputy Commissioner Nyquist and staff members of the Education Department to visit Buffalo and consult with the Board concerning the kind of plan and program of action which would be needed. The date of November 15, 1967 was set as the date for submission of the Board of a timetable for development and carrying out of an integration plan. That was eventually changed to require an interim report by November 15 and a final report by December 15. On January 30, 1968, the Board transmitted its recommendations to Commissioner Allen.

On May 21, 1968, Commissioner Allen replied to the Board's recommendations. In his letter, the Commissioner stated:

"The January 31, 1968 report presents a comprehensive plan for improved racial balance with a definite timetable for action."

The 1968 plan would, if it had been fully implemented, have substantially integrated the Buffalo schools. Its implementation was, as detailed in the fact statement, subjected to legislative and financial frustrations and eventually came to naught. Subsequent negotiations and directives resulted in rejection of a plan for integration submitted to the Board of Education by the Commissioner of Education and instigated the "show cause" proceedings which were not yet initiated at the close of the trial (although they were subsequently held).

The record, we submit, clearly shows that the State did continuously try to move the Buffalo school system toward integration, that some progress was made, and that some progress was obstructed by the Common Council over which the Commissioner has no jurisdiction. In any event, even though the pace of the Commissioner's efforts do not satisfy plaintiffs, there is no proof that integration efforts were abandoned by the State defendants or that the State caused, implemented or acquiesced in the maintenance of Buffalo's racially imbalanced school system; * or that the State defendants acted with a purpose or intent to segregate.

* Claims relating to acts of the State Legislature do not create responsibility in the named State defendants. Additionally, no current acts by the Legislature are in issue. The only issue raised by plaintiffs in this respect relates to the elimination of State aid for integration purposes; however, the Legislature could have determined that the money so far provided had not produced desired results and could be better used elsewhere. For example, from 1966 to 1971 over \$2,000,000 in State aid was provided to Buffalo to correct racial imbalance and today the problem is worse than in 1966.

CONCLUSION

THE ORDERS APPEALED FROM SHOULD BE RE-
VERSED AND THE COMPLAINT DISMISSED AS TO
THE STATE DEFENDANTS.

Dated: April 5, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

EUGENE PANFIL
Assistant Attorney General

of Counsel

AFFIDAVIT OF SERVICE

George Arthur, et al.,
Appellees,

-against-

Ewald B. Nyquist, et al.,
Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:

I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the appellants herein.

On the 4th day of April 197 7 I served
the annexed brief upon the
attorney^s named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorney^s at the
address es within the State respectively theretofore designated by
them for that purpose as follows:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe, 2 Main Pl, Buffalo, NY 14202
Leslie G. Foschio, Corp. Counsel, 65 Niagara Square, Buffalo, NY 14202
Linden & Deutsch, Esqs., 110 East 59th St., New York, NY 10022
Peter A. Bienstock, Esq., 1133 Fifth Avenue, New York, NY 10028

Sworn to before me this

4th day of April 197 7

Ralph D. Camardo

RAIPH D. CAMARDO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires 12-30-1977

